In The

Supreme Court of the United States

October Term, 1977

No. 77-1682

LISA-JET, INC., a corporation,

Petitioner,

vs.

DUNCAN AVIATION, INC., a corporation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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The petitioner Lisa-Jet, Inc. ("Lisa-Jet") respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on February 2, 1978.

OPINIONS BELOW

The opinion of the United States Court of Appeals dated February 2, 1978, is set forth in the Appendix at 2a[1] and is reported at 569 F. 2d 1044. The opinion of

1 References to "—a" are to the pagination of the Appendix to this Petition.

the United States District Court for the District of Nebraska dated March 11, 1977, is set forth at 11a and is unreported.

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on February 2, 1978. A timely motion for rehearing was denied on February 27, 1978, and this petition for certiorari was filed within 90 days of that date. This court's jurisdiction is invoked under 28 U. S. C. § 1254 (1).

QUESTION PRESENTED

Do the regulations of the Federal Aviation Administration governing the duty of a pilot in command of a dual-control private aircraft, whose flight is otherwise governed and controlled by FAA regulations, establish a uniform, national standard with respect to pilot responsibility for the safe operation of such aircraft which overrides contrary state common law?

STATUTES AND REGULATIONS INVOLVED

The regulations involved here were prescribed by the Federal Aviation Administrator, pursuant to 49 U. S. C. § 1348 (c), which states:

> The Administrator is further authorized and directed to prescribe air traffic rules and regulations governing the flight of aircraft, for the navigation, protection, and identification of aircraft, for the protection of persons and property on the ground, and for the efficient utilization of the navigable airspace, including the rules as to safe altitudes of flight and rules for the prevention of collision between aircraft, between aircraft and land or water vehicles, and between aircraft and airborne objects.

The regulations provide that:

> "Pilot in command" means the pilot responsible for the operation and safety of an aircraft during flight time.

14 C. F. R. § 1.1 (1973).

> The pilot in command of an aircraft is directly responsible for, and is the final authority as to the operation of that aircraft.

14 C. F. R. § 91.3 (a) (1973).

> In an emergency requiring immediate action the pilot in command may deviate from any rule of this subpart or of subpart B to the extent required to meet that emergency. . . .

14 C. F. R. § 91.3 (b) (1973).

> No person may operate a civil aircraft that is being used for flight instruction unless that aircraft has fully functioning dual controls.

14 C. F. R. § 91.21 (1973).

STATEMENT OF THE CASE

The Factual Background

On September 25, 1973, a Learjet 25 owned by Lisa-Jet crashed shortly after take-off just beyond the end of the runway at Lincoln Municipal Airport, Lincoln, Nebraska. The Learjet was being used for an instructional flight, and Duncan Aviation's flight instructor was seated in the right-hand seat in the cockpit at the time of the crash.

Lisa-Jet purchased the Learjet in August, 1973, intending to lease it for use in charter operations. Planes, Inc., the intended lessee, made arrangements with Duncan to have a prospective employee instructed in the plane's operation so that he could obtain type ratings in the operation of this aircraft. Planes, Inc. agreed to pay for the instruction and expenses; Lisa-Jet supplied the aircraft; and Duncan selected one of its instructors to provide the training. Instruction began on September 21, 1973, after Duncan's pilot had flown the aircraft to Lincoln from Memphis, Tennessee, after the plane had received its FAA Certificate of Airworthiness. On September 24, Planes' prospective employee told the Duncan instructor he needed more training, even though he had just received his type rating for the Lear 25.

On the morning of September 25, Duncan's instructor requested a weather briefing, and filed a flight plan for Omaha, Nebraska, telling the air traffic controller he was the pilot. The instructor's name was entered as pilot on the FAA flight plan record. Ten minutes after the weather briefing, the Learjet began its take-off roll,

at which time radar departure picked up the plane on its scope. Radio contact with the Learjet was established near the end of the runway, but within a few seconds contact was lost. Shortly thereafter the aircraft was found lying in a field approximately ¾ mile from the end of the runway. Both the trainee and instructor were killed in the crash. The National Transportation Safety Board investigation showed, among other things, that the trainee occupied the left-hand seat and the instructor was in the right-hand seat. This was in accord with the normal practice for instructional flights.

The Proceedings in the Courts Below

Lisa-Jet filed an action in the United States District Court for the District of Nebraska, alleging Duncan Aviation's liability for the accident on the basis of conversion[2] and negligence theories. Jurisdiction was based upon diversity of citizenship. 28 U. S. C. § 1332. The action was tried to a jury and the trial court sustained the defendant's motion for a directed verdict at the close of the plaintiff's evidence (11a). This decision was affirmed by the United States Court of Appeals for the Eighth Circuit.

This petition focuses on Lisa-Jet's theory, urged in both courts, that it was entitled to have a jury determine the responsibility of Duncan Aviation for any negligent

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2 While instructional flight was an authorized use of the aircraft, Lisa-Jet questioned whether this 12 minute flight from Lincoln to Omaha under adverse weather conditions was really instructional. Duncan had scheduled this aircraft for use on an Omaha to Montreal charter. Lisa-Jet had not authorized such charter use.

operation of the aircraft, regardless of which pilot was the active tortfeasor, because Duncan's instructor pilot was the pilot in command. Duncan did not deny that the accident was caused by pilot error, but did dispute the specific nature of the pilot error and the identity of the person committing active negligence.[3]

Throughout these proceedings Lisa-Jet has contended that even in the absence of proof of specific acts of negligence by the Duncan instructor, a jury could have imposed liability on Duncan because of the instructor relationship which existed between its employee and the trainee during the flight. In support of this contention, Lisa-Jet introduced into evidence the Federal Aviation Administration regulations which establish the primary responsibility of the pilot in command.[4]

Lisa-Jet adduced expert testimony, which was uncontradicted and admitted into evidence without objection, that in any training flight the instructor is the pilot in command of the aircraft. Furthermore, Lisa-Jet's experts testified to specific acts of negligence in the form of pilot

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3 Because of the directed verdict Duncan's evidence was never presented at trial. In answers to interrogatories Duncan stated that, "To the best of [its] knowledge the accident was caused by pilot error." Defendant's Answer to Interrogatory 5, filed July 26, 1976. Duncan's position was that the trainee was flying the aircraft and became disoriented at the time of the accident.

4 14 C. F. R. §§ 1.1, 91.3 (a), 91.3 (b), 91.21 (1973). These regulations were promulgated by the Federal Aviation Administrator as required by 49 U. S. C. § 1348 (c). They were offered and received into evidence as Plaintiff's Exhibit 45.

errors, which proximately caused or contributed to the crash.[5]

Rejecting both the FAA regulations and the expert testimony, the courts below held that the case was controlled by *Mitchell v. Eyre,* 190 Neb. 182, 206 N. W. 2d 839 (1973). Under the reasoning of that case, both courts held that in order to recover it was necessary for Lisa-Jet "to prove who was piloting the plane at the time of the crash." *Id.* at 190, 206 N. W. 2d at 844.

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REASONS FOR GRANTING THE WRIT

1. Introduction

This Court has long recognized that regulation of air safety is a matter of national responsibility. The Federal Aviation Administration has adopted extensive regulations governing the duty and standard of care for aircraft pilots. At the same time, state courts and federal courts sitting in diversity have been called upon to define these concepts in aviation accident litigation. While some courts have felt bound by FAA regulations defining a

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5 The negligence principally involved an improper flap setting at the time of take-off and the failure to monitor the aircraft's artificial horizon after take-off under weather conditions requiring instrument flight. After take-off the plane, under full power, failed to climb and maintain altitude; instead, it came into contact with the ground while in a near level attitude at a point 3/4 mile beyond departure end of the runway, approximately on line with the centerline of the runway extended.

pilot's duty of care, others have given FAA regulations little or no weight.

In this representative case, the courts below were faced with the issue of whether a pilot instructor in a dual-control airplane was the pilot in command and thus chargeable with responsibility for its safe operation. Although FAA regulations clearly fix ultimate responsibility on the pilot in command, the courts below instead applied Nebraska common law requiring actual proof of who was flying the plane at the time of the crash. If the plane had instead crashed in Minnesota, the responsibility for the accident would clearly have been upon the instructor as pilot in command. *See, Lange v. Nelson-Ryan Flight, Inc.*, 259 Minn. 460, 108 N. W. 2d 428 (1961). The decisions below thus undermine the pattern of uniform regulation which is the hallmark of the federal aviation laws.

The confusion about the role which FAA regulations should play in establishing responsibility for aviation accidents, the public interest in a uniform system of laws governing air traffic safety, the rapid growth of private non-commercial aviation in the United States, and the plain error in the opinions below, warrant review by this Court.

2. The Interest of the Public in Aviation Safety

Civil aviation has long been viewed as falling within the exclusive domain of the federal government.

> Congress has recognized the national responsibility for regulating air commerce. Federal control is intensive and exclusive. Planes do not wander about in the sky like vagrant clouds. They move only by

> federal permission, subject to federal inspection, in the hands of federally certified personnel and under an intricate system of federal commands. The moment a ship taxis onto a runway it is caught up in an elaborate and detailed system of controls. It takes off only by instruction from the control tower, it travels on prescribed beams, it may be diverted from its intended landing, and it obeys signals and orders. Its privileges, rights, and protection, so far as transit is concerned, it owes to the Federal Government alone, and not to any state government.

Northwest Airlines v. Minnesota, 322 U. S. 292, 303 (1943) (Justice Jackson concurring). The federal regulatory scheme is bottomed on a national concern for safety and efficiency in civil aviation, even in situations involving wholly intrastate flights. *See Rosehan v. United States,* 131 F. 2d 932 (10th Cir. 1942). The Federal Aviation Act of 1958, like the predecessor Civil Aeronautics Act, was enacted:

> as advanced legislation in recognition of rapidly growing air commerce and was comprehensively designed to promote civil aeronautics, and to that end develop and secure maximum aeronautical safety. * * * The Act created a civil aeronautics authority to be composed of expert personnel, with powers to effectuate the full purposes of the Act. * * * Congress has not seen fit to limit the question of safety in these circumstances to a manifestation of actual danger, rather it has sought to eliminate all potential elements of danger.

Id. at 934-35; *accord, Arney v. United States,* 479 F. 2d 653, 658 (9th Cir. 1973).

The regulatory authority of the FAA has expanded in response to the growth of civil aviation in general, and now requires the uniformity that only a federal system

can provide. *See Chicago & S. Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 107 (1947).

The need for uniform standards governing the safe operation of aircraft is further emphasized by the recent rapid growth of private noncommercial aviation. The number of general aviation aircraft increased 50% from 1966 to 1975, and this growth was matched by increases in actual hours and miles flown in general aviation, and the number of airports on record with the FAA (18a). There has been a corresponding increase in instructional flight activity (18a). Of the ten busiest American airports with FAA towers in 1975, seven were predominantly or exclusively used for general aviation.[6]

As private aviation continues to grow in popularity, state law should develop consistently with the FAA's comprehensive scheme of safety regulations.

3. There is a Practical Need to Clarify the Role of FAA Regulations

From the time Duncan's pilot sought a weather briefing and filed his flight plan until FAA employees completed their accident investigation, the Learjet's flight was controlled by federal regulations. Yet the Eighth Circuit, in effect, held that the regulations pertaining to the duty of the pilot in command are negated by Nebraska common law. The need for this Court to review this limited but important public issue is emphasized by the clear conflict between various lower court decisions over

6 U.S. Dept. of Transportation, FAA Statistical Handbook of Aviation: Calendar Year 1975, Tables 2.3, 2.7 (1976).

the weight to accord to FAA safety regulations in accident litigation.

Because of the strong public interest in aviation safety, state and federal courts have often predicated civil remedies upon violations of the duty of care established in FAA regulations.[7] In such cases, courts have consistently held that FAA regulations have the force and effect of law.[8]

Here, the evidence did not show who was flying the airplane but did establish that Duncan Aviation's instructor was the pilot in command. FAA regulations clearly fix the responsibility for the safe operation of an aircraft on the pilot who is in command. 14 C.F.R. § 1.1 (1973). The regulations further specify that the pilot in command has the final authority as to the operation of the aircraft, and has the power, where appropriate, to take any action necessary for the safe operation of that aircraft. 14 C.F.R. § 91.3 (1973).

7 Courts are generally reluctant to imply civil remedies for violations of other types of federal safety regulations. *See Implying Civil Remedies From Federal Regulatory Statutes*, 77 Harv. L. Rev. 285 (1963); Comment, *Federal Common Law Remedies Under the Occupational Safety and Health Act of 1970*, 47 Wash. L. Rev. 629, 634-38 (1972); Comment, *The Occupational Safety and Health Act of 1970; Its Role in Civil Litigation*, 28 S.W. L.J. 999, 1007-1113 (1974). The unique treatment afforded FAA regulations emphasizes the pervasive national interest in air safety.

8 *See, e.g., Hartz v. United States*, 387 F.2d 870, 873 (5th Cir. 1968); *Tilley v. United States*, 375 F.2d 678, 680 (4th Cir. 1967); *Todd v. United States*, 384 F. Supp. 1284, 1294 (M.D. Fla. 1975), *aff'd*, 553 F.2d 384 (5th Cir. 1970); *Stork v. United States*, 278 F. Supp. 869, 875-76 (S.D. Cal. 1967), *aff'd*, 430 F.2d 1104 (9th Cir. 1970), *cert. den.*, 398 U.S. 910 (1970).

FAA regulations also recognize the ultimate responsibility of a flight instructor, requiring that no person may operate a civil aircraft for flight instruction unless that aircraft has "fully functioning dual controls." 14 C. F. R. § 91.21 (1973). The requirement of dual controls is an assurance that the instructor can exercise his ultimate responsibility for the flight at all times. This provision is an integral part of the FAA's comprehensive scheme to promote aviation safety.

In other contexts, federal courts have consistently held that the "pilot in command" regulations define a legal duty against which a pilot's conduct should be measured. *Hartz v. United States,* 387 F. 2d 870, 873 (5th Cir. 1968). Hence, where pilots have sought to blame FAA control towers for aviation accidents, primary responsibility has generally been placed on the pilot in command:

> [T]he focal point of ultimate responsibility for the safe operation of aircraft under VFR weather conditions rests with the pilot. Under such conditions he is obligated to observe and avoid other traffic, even if he is flying with a traffic clearance.
>
> The rules governing the duties of pilots . . . make it clear that none of those duties are rendered inapplicable simply because a clearance from a tower has been received.

United States v. Miller, 303 F. 2d 703, 710 (9th Cir. 1962).[9]

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9 *Accord, United States v. Schultetus,* 277 F. 2d 322, 326-27 (5th Cir. 1960), *cert. denied,* 364 U. S. 828 (1960); *Michelmore v. United States,* 299 F. Supp. 1116 (C. D. Cal. 1969), *aff'd,* 455 F. 2d 222 (9th Cir. 1972); *Sawyer v. United States,* 297 F. Supp. 324 (E. D. N. Y. 1969), *aff'd,* 436 F. 2d 640 (2d Cir. 1971); *Somio v. United States,* 274 F. Supp. 827, 841 (E. D. Ill. 1967), *aff'd,* 416 F. 2d 640 (7th Cir. 1969), *cert. den.,* 397 U. S. 989 (1970).

The need to place ultimate responsibility on the pilot in command is even more obvious in instructional flights and is given implicit recognition by the regulatory requirement of dual controls.

> It is axiomatic that any regulation should be construed to effectuate the intent of the enacting body. Such intent may be ascertained by considering the language used and the overall purpose of the regulation, and by reflecting on the practical effect of the possible interpretations.

Id. at 707.

The decisions below ignore the policies underlying the FAA regulations generally and the pilot in command provisions specifically. Because of the public's interest in consistent enforcement of the FAA regulations governing air safety, this Court should use this case to establish that these regulations do define the minimum duty of care which must be exercised by pilots in operating civilian aircraft.

4. The Opinion of the Court Below is Erroneous

In addition to the public policy considerations supporting review, the writ should be granted because the decisions below are manifestly unjust and clearly wrong. The narrow issue before the courts below was whether Lisa-Jet had presented sufficient evidence of Duncan Aviation's negligence to withstand a motion for a directed verdict under F. R. Civ. P. 50 (a). The courts below felt constrained to follow *Mitchell v. Eyre,* 190 Neb. 182, 206 N. W. 2d 839 (1973), which required that the plaintiff establish the "identity of the pilot at the time of the crash" (7a).

Mitchell v. Eyre did not involve an instructor-trainee relationship between the dual pilots. The Nebraska Supreme Court instead recognized that a different result might well obtain where one of the dual pilots was an instructor and was shown to be the pilot in command. It expressly distinguished a Minnesota Supreme Court decision which had imposed liability on the instructor in the instructor-trainee context in the absence of proof as to who the actual pilot was. *Lange v. Nelson-Ryan Flight, Inc.*, 259 Minn. 460, 108 N. W. 2d 428 (1961). According to *Mitchell v. Eyre,*

> [*Lange*] involved a crash killing both occupants, one of whom was an instructor and the other a trainee. The Minnesota court there determined the instructor was the pilot in command.

190 Neb. at 197, 206 N. W. 2d at 842.

Here, as in *Lange,* the plaintiffs' evidence established that the flight was a training flight and that, by virtue of the FAA regulations and the instructor's own admissions, he was the pilot in command. Despite this evidence, the courts below nevertheless refused to submit the case to the jury without further proof as to who was flying the plane. This completely misinterprets *Mitchell v. Eyre* and contradicts the *Lange* decision.

The effect of the Eighth Circuit's decision is to deprive Lisa-Jet of its day in court. This error is compounded by the circuit court's erroneous refusal to permit submission of Lisa-Jet's expert testimony as to the individual acts of negligence by Duncan Aviation's pilot in-

structor.[10] But even assuming that the court was correct in this evidentiary analysis, this would not preclude submission of the expert testimony as to the pilot's negligence if all such negligence were imputable to the pilot in command.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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May 24, 1978

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10 Opinion evidence by pilots was offered and received in support of Lisa-Jet's position that: (1) weather conditions were such that the instructor should have made the take-off; (2) there was an inadequate preflight check; (3) a no-flap take-off was attempted rather than the proper 20° flap setting; (4) there was a failure to establish a proper climb altitude after take off; (5) the instructor failed to monitor the artificial horizon and take corrective action; and (6) the instructor failed to recover the aircraft. The court of appeals characterized these opinions as circumstantial evidence, and, in the judgment of petitioner, inappropriately applied rules dealing with sufficiency of circumstantial evidence to direct opinion testimony. *See e. g., The Congress and Empire Spring Co. v. Edgar,* 99 U. S. 645 (1879); *FPC v. Florida Power & Light,* 404 U. S. 453 (1972).

APPENDIX

ORDER OF UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT DENYING PETITION FOR REHEARING EN BANC, ENTERED FEBRUARY 27, 1978

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

September Term, 1977

77-1371

LISA-JET, ETC.,

Appellant,

vs.

DUNCAN AVIATION, INC., ETC.,

Appellee.

Appeal from the United States District Court
for the District of Nebraska

The Court having considered petition for rehearing en banc filed by counsel for appellant and, being fully advised in the premises, it is ordered that the petition for rehearing en banc be, and it is hereby, denied.

Considering the petition for rehearing en banc as a petition for rehearing, it is ordered that the petition for rehearing also be, and it is hereby, denied.

February 27, 1978

OPINION AND JUDGMENT OF UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT, ENTERED FEBRUARY 2, 1978

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 77-1371

LISA-JET, INC.,

Appellant,

vs.

DUNCAN AVIATION, INC.,

Appellee.

Appeal from the United States District Court for the District of Nebraska

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Submitted: November 17, 1977

Filed: February 2, 1978

Before VAN OOSTERHOUT, Senior Circuit Judge, LAY and STEPHENSON, Circuit Judges.

STEPHENSON, Circuit Judge.

Plaintiff Lisa-Jet, Inc. below sought recovery from defendant Duncan Aviation, Inc. for destruction of its Learjet 25, which crashed shortly after take-off from the Lincoln, Nebraska, municipal airport. This diversity action was tried to a jury; however, the district court[1] sus-

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1 The Honorable Richard E. Robinson, Senior District Judge, United States District Court for the District of Nebraska, presided.

tained defendant's motion for a directed verdict at the close of plaintiff's case and thereafter denied plaintiff's motion for new trial. This appeal followed. We affirm the district court.

We, of course, review the record under the well established principles that "[a] motion for a directed verdict should be granted 'only when all the evidence points one way and is susceptible of no reasonable inferences sustaining the position of the nonmoving party.' *Decker-Ruhl Ford Sales, Inc. v. Ford Motor Credit Co.*, 523 F. 2d 833, 836 (8th Cir. 1975)." *Barclay v. Burlington Northern, Inc.*, 536 F. 2d 263, 267 (8th Cir. 1976). "In making this determination, the evidence, together with all reasonable inferences to be drawn therefrom, must be viewed in the light most favorable to the nonmoving party." *Decker-Ruhl Ford Sales, Inc. v. Ford Motor Credit Co., supra,* 523 F. 2d at 836. A directed verdict should not be granted unless the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion. *Hernon v. Revere Copper & Brass, Inc.*, 494 F. 2d 705, 709 (8th Cir.), *cert. denied,* 419 U. S. 867 (1974).

In August 1973 Lisa-Jet purchased the subject Learjet 25 with the intention to lease it to Planes, Inc. for use in charter operations as it had frequently done in the past with other aircraft. Lawrence J. Block was president of both Lisa-Jet and Planes. Planes made arrangements with Duncan Aviation to have Horn, an employee of Planes, and Burke, a prospective employee, instructed in

the operation of a Learjet 25[2] so that they might obtain type ratings in the operation of this aircraft. Planes agreed to pay for the instruction and expenses; Lisa-Jet supplied the aircraft. Duncan selected one of its instructors, David Williams, to provide the instruction. Williams flew to Memphis, picked up the Learjet 25 together with Horn and Burke, and returned to Lincoln.

Instructor Williams, with the approval of Block, made the necessary arrangements for Burke alone[3] to take the test and check ride in Denver, Colorado, on September 24. Burke was issued his type rating and thereafter Burke and Williams flew back to Lincoln. That evening Block contacted Burke, who indicated he had received his type rating, but stated that he was "not really comfortable in that airplane yet" and requested permission to use the plane for a couple of hours more training the following day. Block agreed, expecting Burke to return to Atlanta the next day with the plane after the additional flight training.

The following morning at 7:07 a.m Instructor Williams contacted Lincoln Flight Service Center by commercial telephone and requested a weather briefing to Omaha, Nebraska. He received a local weather briefing from air traffic controller Sharp indicating a 100-foot ceiling and visibility of 3/8 of a mile. Williams also filed an instrument flight rules (IFR) flight plan for Omaha. Williams

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2 Both Horn and Burke were licensed and experienced jet aircraft pilots. However, neither had the required "type rating" for the Learjet 25.

3 Horn needed more work on the plane before he would be in a position to pass the check.

told Sharp that he was the pilot and Sharp entered the name Williams as pilot on the flight plan record. Four minutes later plaintiff's Learjet contacted "ground control" on its radio and received taxi instructions. At 7:17 a.m., ten minutes after the weather briefing, plaintiff's Learjet initiated its take-off roll, at which time radar departure picked up the Learjet on its scope. Radio contact with the Learjet was established near the end of the runway, as the plane reported "climbin' to nine." Within a few seconds radar contact was lost. Shortly thereafter the aircraft was found lying in a field approximately ¾ mile from the end of the runway. Both Burke and Williams were killed in the crash. Subsequent investigation showed that Burke occupied the left-hand seat and Instructor Williams was in the right-hand seat. This was in accord with the normal practice of the trainee pilot occupying the left seat and the instructor pilot the right seat.

Lisa-Jet below and on this appeal asserts evidence was offered sufficient to create submissible issues for the jury on two distinct theories of recovery. Initially Lisa-Jet asserts that Duncan converted its aircraft to Duncan's own use when it commenced the flight from Lincoln to Omaha for the purpose of carrying out a charter flight from Omaha to Montreal. Alternatively, Lisa-Jet urges that Duncan is responsible for any negligent operation of the aircraft, regardless of who the active tortfeasor might be, due to the fact that the plane was under the command of Duncan's instructor pilot, Williams, and further that Duncan's instructor pilot was guilty of specific acts of negligence as instructor pilot.

Lisa-Jet's claim that there was a conversion of the aircraft by Duncan at the time of the accident is devoid of merit. The record disclosed that after its arrival in Omaha the Learjet was to pick up passengers for a charter flight to Montreal. Duncan's chief executive officer, Donald Duncan, testified that the charter flight had been arranged with the express permission of Mr. Block. The latter denied any knowledge concerning the same. Assuming arguendo that the charter was not authorized, it was not to begin until the plane arrived in Omaha, which it never did. At the time of the crash the plane was commencing a training flight approved by Mr. Block, Lisa-Jet's president. This claim was properly dismissed.

Lisa-Jet contends that even in the absence of proof of specific acts of negligence on the part of Williams, negligence concepts impose liability on Duncan, his employer, by virtue of the instructor relationship which existed at the time of the flight in question. In effect appellant asserts that Instructor Williams was the pilot-in-command of the aircraft at the time of the accident and is vicariously liable for any negligence which was a proximate cause of the accident regardless of proof as to which person was piloting the plane at the time of the crash. Appellant cites *Lange v. Nelson-Ryan Flight Service, Inc.*, 108 N. W. 2d 428 (Minn. 1961), *cert. denied*, 371 U. S. 953 (1963), in support thereof. This case holds that the instructor, as the pilot-in-command, is responsible for any negligence in the operation of an aircraft regardless of whether or not it could be established that he was in actual operation of the controls at the time.

We agree with the district court that the applicable law of Nebraska imposes no such presumption of respon-

sibility where, as here, both pilots were capable of operating the aircraft at the time of the accident. In *Mitchell v. Eyre*, 206 N. W. 2d 839 (Neb. 1973), the evidence disclosed decedent Eyre as the pilot-in-command at the take-off and decedent Mitchell as the observer. There, as here, it was possible for either person to be flying the aircraft at any given time. The identity of the pilot at the time of the crash could not be established. In affirming a verdict for the defendant the Nebraska Supreme Court stated that a directed verdict at the close of the plaintiff's evidence should have been sustained. The court's comments which are pertinent here were as follows:

> Plaintiff may be right in urging that the crash occurred because the plane was flying too low to recover from a stall. Granting this fact and granting also that it was the result of the negligence of one of the parties, still leaves many unanswered questions. The dual controls were connected. Regardless of which one of the decedents may have been operating the plane the other could have taken some action which precipitated the difficulty. Any conclusion we draw must be based upon surmise and conjecture.
>
> • • • To recover herein the plaintiff was required to prove who was piloting the plane at the time of the crash. Until she has done so she has not met her burden of proof. The finding of negligence is immaterial until we can determine the identity of the person to be charged with responsibility for the negligence. An issue depending entirely upon speculation, surmise, or conjecture is never sufficient to sustain a judgment.

Mitchell v. Eyre, supra, 206 N. W. 2d at 844. *See Udseth v. United States*, 530 F. 2d 860 (10th Cir. 1976). We

are satisfied that the district court correctly determined that Lisa-Jet could not recover under the pilot-in-command theory.

Finally, Lisa-Jet maintains that its evidence created a submissible case with respect to its claim that the accident was caused by independent acts of negligence on the part of Instructor Williams, as follows: weather conditions were such that the take-off should have been made by the instructor; inadequate preflight and pre-take-off checks; flaps in "up" position; failure to make certain the aircraft was kept and maintained in a normal climb immediately after take-off; failure to recognize the aircraft was losing altitude after take-off; and failure to recover the aircraft and resume flight after initial impact.

Lisa-Jet sought to establish these specifications of negligence by *introducing the opinions of various witnesses,* which in turn were of necessity based upon circumstances surrounding the crash of the airplane. The district court, in commenting that the test of the sufficiency of circumstantial evidence under federal law and Nebraska law was substantially the same, stated:

> The test of the sufficiency of circumstantial evidence under federal law is as follows:
>
> > "It is not necessary in establishing a necessary fact by circumstantial evidence that a party whom the burden of proof rests shall present evidence to dispel all contradictory inferences. It is necessary, however, that such party produce evidence of facts and circumstances which may be accepted by the trier of the fact as establishing with reasonable certainty the truth of the inference contended for.
> >
> > * * *

> > "If the proven facts give equal support to each of two inconsistent inferences then judgment must go against the party upon whom rests the necessity of sustaining one of these inferences. The essential inference cannot be left to conjecture and speculation. * * *."
>
> *Ford Motor Company v. Mondragon,* 271 F. 2d 342, 345 (8th Cir. 1959). The Court notes that the Nebraska standard for the sufficiency of circumstantial evidence is substantially the same as the federal test. In the case of *Bedford v. Herman,* 158 Neb. 400, 63 N. W. 2d 772 (1954), the Nebraska court held that
>
> > in order for circumstantial evidence to be sufficient to require the submission of an issue of negligence to a jury it must be such that a reasonable inference of negligence arises from the circumstances established. If such evidence is susceptible to any other reasonable inference, inconsistent with the inference of negligence on the part of the party charged, it is insufficient to carry the case to the jury.
>
> *Id.* at 774.

We are not persuaded that the Nebraska standard is the same as the federal standard. *See Twin City Plaza, Inc. v. Central Surety & Ins. Corp.,* 409 F. 2d 1195, 1202 n. 8. *But see Sherman v. Travelers Indemnity Co.,* 225 N. W. 2d 547 (Neb. 1975). However, we need not decide which standard controls because we are satisfied from our examination of the record that under either the federal or state standard the district court's determination that the essential inference of negligence on the part of Instructor Williams can only be made through conjecture and speculation is correct. The mere fact that the accident happened does not give rise to an inference of negli-

gence on the part of anyone. A careful review of the record leaves but one impression--the cause of the accident is unknown.

Affirmed.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT

MEMORANDUM AND ORDER OF UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA, ENTERED MARCH 11, 1977

CV 76-L-113

LISA-JET, INC., A Corporation,

Plaintiff,

vs.

DUNCAN AVIATION, INC., A Corporation,

Defendant.

MEMORANDUM

ROBINSON, Senior Judge.

This case was tried to the Court and a Jury through the conclusion of the plaintiff's case-in-chief. At that point the defendant moved for a directed verdict on the following grounds:

1. That the plaintiff had failed to adduce sufficient evidence under Nebraska law to allow submission of the issues to the jury;

2. That the plaintiff had failed to meet its burden of proof on the negligence claim;

3. That the evidence adduced would require speculation and conjecture on the part of the jury if the issues were submitted to them for consideration; and

4. That the plaintiff had presented no evidence to establish the claim for conversion of the aircraft.

I

A motion for a directed verdict should be granted only when all the evidence points one way and is susceptible of no reasonable inferences sustaining the position of the nonmoving party. *Decker-Ruhl Ford Sales, Inc. v. Ford Motor Credit Company,* 523 F. 2d 833, 836 (8th Cir. 1975). In making this determination, the evidence, together with all reasonable inferences to be drawn therefrom, must be viewed in the light most favorable to the nonmoving party. *Id.*

These principles must now be applied to the present situation in order to determine whether the defendant's motion should be sustained.

II

Plaintiff's negligence claim is based upon two separate theories of recovery. The first theory is that if David Williams, defendant's pilot, was the pilot-in-command of the aircraft at the time of the accident, then he is vicariously liable for *any* negligence which was a proximate cause of the accident. With this approach the plaintiff seeks to avoid the necessity of proving which pilot was in control of the aircraft at the time of the accident by raising a presumption that the pilot-in-command is negligent if the aircraft is operated in a negligent fashion by either pilot. In the case of *Mitchell v. Eyre,* 190 Neb. 182, 206 N. W. 2d 839 (1973), the Supreme Court of Nebraska declined to establish such a presumption in a factual situation where, as here, both pilots were capable of operating the aircraft at the time of the accident. All the evidence in the present case points to the fact that

Clarence Gene Burke was in control of the aircraft at the time of the accident, and Mr. Burke had just the day previous to the accident been certified by the FAA to fly this type of aircraft. While in viewing the evidence most favorably to the plaintiff it is possible to say that Mr. Williams was acting in the capacity of an instructor to Mr. Burke at the time of the accident, the fact remains that Mr. Burke was fully capable of flying the aircraft at that time. The Court interprets the *Mitchell* decision to mean that a presumption of liability on the part of the pilot-in-command will not arise when either of two pilots could have been in control of the aircraft at the time of the accident. Thus, by operation of the *Erie* doctrine, this aspect of plaintiff's negligence claim must be withdrawn from consideration by the Jury.

Plaintiff's other theory of negligence is that David Williams failed to maintain the standard of care required of an instructor pilot, and that this negligence was a proximate cause of the accident. In this respect the plaintiff has sought to establish his specifications of negligence by introducing the opinions of various witnesses. These opinions were, of necessity, based upon the circumstances surrounding the crash of the airplane.

The test of the sufficiency of circumstantial evidence under federal law is as follows:

> "It is not necessary in establishing a necessary fact by circumstantial evidence that a party upon whom the burden of proof rests shall present evidence to dispel all contradictory inferences. It is necessary, however, that such party produce evidence of facts and circumstances which may be accepted by the trier of the fact as establishing with reasonable certainty the truth of the inference contended for.
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> • • •

> "If the proven facts give equal support to each of two inconsistent inferences then judgment must go against the party upon whom rests the necessity of sustaining one of these inferences. The essential inference cannot be left to conjecture and speculation. * * *."

Ford Motor Company v. Mondragon, 271 F. 2d 342, 345 (8th Cir. 1959). The Court notes that the Nebraska standard for the sufficiency of circumstantial evidence is substantially the same as the federal test. In the case of *Bedford v. Herman,* 158 Neb. 400, 63 N. W. 2d 772 (1954), the Nebraska court held that

> in order for circumstantial evidence to be sufficient to require the submission of an issue of negligence to a jury it must be such that a reasonable inference of negligence arises from the circumstances established. If such evidence is susceptible to any other reasonable inference, inconsistent with the inference of negligence on the part of the party charged, it is insufficient to carry the case to the jury.

Id. at 774.

The Court has concluded that on the basis of the record as it presently stands, the essential inference of negligence on the part of David Williams can only be made through conjecture and speculation. For example, plaintiff attempts to establish that an adequate pre-flight check could not have been accomplished due to the short period of time between the call for the weather information and takeoff. It appears to the Court that this circumstance also gives rise to the inference that the pre-flight check could have been done *before* the call for the weather, as well as any number of other possibilities which may be conjectured upon.

The mere fact that an accident happened does not raise a presumption of negligence on the part of anyone, and the Court feels negligence on the part of David Williams proximately resulting in the crash of the aircraft could be found by the jury only through surmise and speculation. It will probably be impossible to ever determine what exactly did happen to cause this accident,[1] but in any event, the Court cannot allow the jury to venture a guess. Plaintiff has therefore failed to meet its burden of proof on the negligence claim.

IV

Plaintiff's claim that there was a conversion of the aircraft by the defendant must likewise fail. There has been no evidence adduced which would establish an unauthorized appropriation of the aircraft at the time of the accident. First of all, the charter flight on which plaintiff's allegation rests was not to begin until the plane reached Omaha, which it never did. Further, all the evidence points to the fact that Mr. Burke was flying the aircraft when it crashed, and it is difficult for the Court to determine how a conversion by the defendant arose when the plaintiff's agent Burke was in control of the plane at the time that it was destroyed. The conversion claim must also be dismissed by the Court due to a failure of proof thereon.

V

Two matters respecting offers of and objections to evidence remain for the Court's consideration.

The plaintiff offered Plaintiff's Exhibit 45, and the defendant requested an opportunity to review the same

before making any objections thereto. The defendant has now objected to the admission of this exhibit into evidence on the basis of relevancy. This objection will be overruled, and Plaintiff's Exhibit 45 will be received.

The plaintiff also offered the last page of the NTSB accident report (Plaintiff's Exhibit 1) in response to defendant's cross-examination of Robert Hunt. The defendant objected to this offer, and the objection will be sustained on the ground that its admission would be highly prejudicial.

A separate Order will be entered this day in accordance with the terms of this Memorandum.

Dated this 11th day of March, 1977.

FOOTNOTE

1. The difficulty of proof in this case arises from the fact that all occupants of the aircraft were killed in the crash thereof.

ORDER

Pursuant to the Memorandum accompanying this Order,

IT IS ORDERED that defendant's Motion for a Directed Verdict is sustained, and this action is dismissed with prejudice.

IT IS FURTHER ORDERED that Plaintiff's Exhibit 45 will be received into evidence, and the defendant's objection thereto is overruled.

IT IS FURTHER ORDERED that defendant's objection to the admission of the last page of Plaintiff's Exhibit 1 is sustained.

Dated this 11th day of March, 1977.

BY THE COURT:

/s/ Richard E. Robinson
Senior Judge,
United States District Court

GROWTH OF AMERICAN GENERAL AVIATION: COMPARISON OF AIRCRAFT ACTIVITY, AIRPORTS & PILOTS, 1966-1975

	1966	1975
Total Active General Aviation Aircraft, as of 12/31	104,706	168,475
Total Estimated Miles Flown in General Aviation (Thousands of Miles)	3,336,138	4,238,400
Total Estimated Hours Flown in General Aviation (Thousands of Hours)	21,023	34,165
Number of Airports on Record with FAA	9,673	13,251
Active Non-Commercial Pilot Certificates Held, as of 12/31	417,218	538,845

GROWTH OF GENERAL AVIATION INSTRUCTION: COMPARISON OF ACTIVITY, 1966-1975

Total Estimated Miles Flown in General Aviation Instruction (Thousands of Miles)	640,169	829,362
Total Estimated Hours Flown in General Aviation Instruction (Thousands of Hours)	5,674	8,174

Source: U. S. Department of Transportation, FAA STATISTICAL HANDBOOK OF AVIATION: CALENDAR YEAR 1975, Tables 7.1, 8.3, 8.5, 8.6 (1976).